No. 21686
and
No. 21686-A

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID PEREA ROMERO,
RONALD EUGENE TICKLE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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APPELLEE'S BRIEF

I

JURISDICTION AND STATEMENT OF THE CASE

On August 3, 1966, appellants David Perea Romero and Ronald Eugene Tickle were indicted by the Federal Grand Jury for the then Southern District of California, Central Division, in two counts, each of which alleged violations of Title 21, United States Code, Section 174. Appellant Romero was charged in both counts; appellant Tickle was charged only in Count Two [C. T. 2]. 1/

On August 15, 1966, each appellant was arraigned and a

1/ "C. T." refers to Clerk's Transcript of Record.

plea of not guilty was entered [C. T. 70].

Prior to trial, appellants moved for discovery and inspection [C. T. 18-23]; to suppress the evidence [C. T. 24-29]; and for severance [C. T. 30-34].

On October 5, 1966, the court ordered the appellants be severed for trial [C. T. 146].

On October 12 and 13, 1966, the court heard appellants' motion to suppress the evidence [C. T. 133], and the court denied the motions [R. T. 257]. 2/ Thereafter appellant Romero and the appellee agreed to waive jury and submit the matter to the court on the evidence presented at the hearing on the motion to suppress [R. T. 259]. Thus the case was tried without a jury before the Honorable Albert Lee Stephens, Jr., United States District Court Judge.

On October 26, 1966, the court found Romero guilty on both counts of the indictment [C. T. 156].

On October 27, 1966, appellant Tickle was tried without a jury before the Honorable Albert Lee Stephens, Jr., and on November 14, 1966, the court found appellant Tickle guilty [C. T. 181-182].

On November 14, 1966, appellant Romero admitted a prior Federal narcotics conviction and was sentenced to imprisonment for a period of 15 years on each count to commence and run concurrently [C. T. 174-175]. Appellant Romero filed a timely notice

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2/ "R. T." refers to Reporter's Transcript of Proceedings.

of appeal [C. T. 177, 184].

On December 12, 1966, appellant Tickle was sentenced to 5 years imprisonment [C. T. 183]. Appellant Tickle filed a timely notice of appeal [C. T. 185].

The jurisdiction of the District Court was predicated on Title 21, United States Code, Section 174 and Title 18, United States Code, Section 3231. This Court has jurisdiction under Title 28, United States Code, Sections 1291 and 1294.

II

STATUTE INVOLVED

Title 21, United States Code, Section 174, provides in pertinent part:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States . . . contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of any such narcotic drug after being imported or brought into the United States contrary to law . . . shall be imprisoned not less than 5 or more than 20 years, and in addition may be fined not more than $20,000.
>
> "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug such possession shall be deemed

sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

III

STATEMENT OF FACTS

1. FACTS AND CIRCUMSTANCES WITHIN THE AGENTS' KNOWLEDGE PRIOR TO ARREST OF DAVID ROMERO.

Count One of the Indictment charged appellant David Romero alone; and, factually concerns the deposit of heroin by Romero in a public telephone booth on May 10, 1966.

Prior to this, the Federal Bureau of Narcotics had conducted an investigation initiated primarily by the receipt of three letters which described the current narcotics activity of David Romero. The letters were mailed to the Federal Bureau of Investigation at Los Angeles, who in turn forwarded them to the Federal Bureau of Narcotics. Each was in Spanish and signed with the name "Juan Sanchez", a person unknown to the Federal Bureau of Narcotics [R.T. 69]. The first letter was received by the Federal Bureau of Narcotics on October 4, 1965, and identified the narcotics violator as the David Romero, who was an ex-convict, with telephone number 356-1806 in Los Angeles [Ex. 1, R.T. 67-71].

The next two letters further identified the narcotics violator as the David Romero who had been incarcerated at McNeil Island, had been in an accident in Culiacan, Sinaloa, and had been in jail

the preceding week because some "hypnotic capsules were found on him" [R. T. 75-77].

Federal Bureau of Narcotics investigation proved this information accurately described appellant Romero [R. T. 70, 75, 77, 282].

Of major interest, the last two letters stated that "Manuel Areyano", of San Luis Rio Colorado, Sonora, Mexico, smuggled the narcotics into the United States for Romero [R. T. 71-72, 78]. The United States Customs Service verified that "Manuel Areyano" was suspected of smuggling narcotics into the United States from Mexico [R. T. 72]. 3/

During a surveillance on March 21, 1966, of the Tickle residence, owned by Romero, Federal Bureau of Narcotics Agents observed a Chevrolet parked in the driveway which was registered to Juana Arrellanes in San Luis Rio Colorado, Sonora, Mexico, and a Ford pick-up parked in front of the house which was registered to Manuel Arrellanes in San Luis - General Delivery [R. T. 73-75]. It is to be noted that in the Spanish language a double "LL" is pronounced "I". Thus "Arrellanes" is pronounced "Areyano" [R. T. 108].

The agents obtained from the telephone company a list of the long distance calls made from Romero's telephone for the six months preceding his arrest in the instant case. This disclosed that numerous calls were made to San Luis, Sonora, Mexico, to

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3/ United States v. Lloyd Thomas, et al., No. 21780, pending before this Court, further describes "Manuel Areyano".

numbers registered to at least twenty individuals with prior narcotics convictions and to the residence of appellant Tickle [R. T. 72, 78-80, Ex. 1, R. T. 384]. An investigation of the calls made from Tickle's residence disclosed similar information [R. T. 87-88]. Illustrative, were the telephone calls to Charles "Snooky" Toliver, a narcotics felon, who had served time with Romero at McNeil Island. In the opinion of the Federal Bureau of Narcotics, Charles "Snooky" Toliver was the main narcotics supplier in the Oakland-San Francisco area [R. T. 87]. The Oakland Police Department related that in December, 1965, both appellants rented a car from the Avis Rental Agency at the San Francisco Airport [R. T. 88, 89, 91]. An informant of the San Francisco office of the Federal Bureau of Narcotics stated that on this occasion in December, Romero had delivered narcotics to Charles "Snooky" Toliver [R. T. 91]. The San Francisco Office of the Federal Bureau of Narcotics also reported that they had determined that appellants Romero and Tickle were in the Oakland area and observed in the vicinity of the residence of Charles "Snooky" Toliver on this occasion [R. T. 88]. In the confession of appellant Tickle, he admitted that appellants had delivered narcotics to Charles "Snooky" Toliver on several occasions and specifically stated that "Just before Christmas 1965, I drove Dave's 1966 Cadillac to Oakland with about twenty to thirty bricks of marihuana. I met Dave at the airport where I rented a 1965 Chevrolet, red in color from Avis. I used Dave's Bank of America Credit Card. We then drove both cars to a motel about a mile from Snooky's house.

We rented two adjoining rooms, #4 and 5. We took the marihuana from Dave's car and put it in the rented car. We stayed two days at the motel. The second day I noticed the rental car was gone. The day we left we went to Snooky's house and I saw the rented car there. We went in the house and Snooky was there. Snooky gave Dave a large amount of money that was in a cigar box." [Ex. 3, R.T. 400].

Further investigation revealed that although Romero was unemployed and had no legitimate source of income, he displayed affluence. He purchased a 1966 Cadillac for a total cash expenditure of approximately $7,000. He owned at least four pieces of property, two of which he purchased in 1966 with down payments exceeding $8,000 [R.T. 83-85].

During the four months preceding arrest, over 30 surveillances were maintained. The surveillances were initially limited to appellant Romero, but later expanded to include appellant Tickle's residence. This disclosed a pattern of Romero stopping at the Tickle residence prior to proceeding to his ultimate destination [R.T. 81-83, 115].

These facts led the agents to conclude that David Romero was actively trafficking in narcotics and was using Ronald Tickle's residence for the cache of narcotics [R.T. 119].

At approximately 5:20 P.M., on May 10, 1966, agents of the Federal Bureau of Narcotics were maintaining surveillance in the area of appellant Tickle's residence. They observed the appellant David Romero arrive, enter the residence and exit at

approximately 6:05 P. M. [R. T. 92-94]. Tickle's car was parked near his residence [R. T. 92]. The Tickle residence is in the city of Sierra Madre [R. T. 116]. Thereafter three cars of agents followed David Romero as he drove to the city of El Monte. He passed through shopping areas where obviously other pay phones were located but he stopped at none until he reached Garvey Boulevard in the city of El Monte, where he parked his vehicle on the North side of the street [R. T. 316, 317]. Although Romero did not pass the phone booth at Garvey and Meeker Streets, he parked one and a half blocks away. Romero exited his vehicle, walking on the North side of Garvey Boulevard. He crossed La Madera Street, continued to the intersection of Meeker on the North side of Garvey. Romero crossed at this intersection to the South side of Garvey, proceeded to cross Meeker and enter a public telephone booth. While inside the telephone booth, Romero was observed by agents of the Federal Bureau of Narcotics. Romero did not place a telephone call. He did not deposit a coin in the coin box; he did not lift the telephone receiver; he did not look into the telephone directories. The sole act performed by David Romero within the telephone booth was a motion of his arm at the level of the counter which extended under the telephone [R. T. 167-168]. Thereafter David Romero exited the telephone booth, retraced his steps, entered his automobile, and sat observing the telephone booth. An agent was sent to check the telephone booth. When the agent entered the phone booth he found a package of heroin on the metal counter under the telephone. The agent exited the telephone booth

and waved his hands broadly in the pre-arranged signal indicating that he had located heroin. At this time David Romero started his vehicle and drove off. Simultaneously by radio message agents Watson and Saiz were notified to stop and arrest David Romero. David Romero drove West in a normal manner until the Federal Narcotics agents pulled beside his vehicle. The agent on the passenger side of the government vehicle had his car window open and was directly opposite David Romero. The window on the driver's side in David Romero's vehicle was open. The government agent yelled "Federal Narcotic Agents, pull over." and held his badge out the window. Romero nodded yes, and simultaneously stepped on the accelerator. He drove at excessive speeds for approximately three-quarters of a block, where he turned North on Meeker. In close pursuit was the government vehicle [R. T. 217]. Both vehicles raced to the corner of San Ignacio and Meeker where David Romero attempted to negotiate a right turn. Romero's car spun out of control and the engine died. Romero's car had skidded completely around and it was now facing the oppose direction from which he had been driving [R. T. 218]. The government vehicle stopped at the passenger side of Romero's car [R. T. 218]. Agent Saiz jumped from the passenger side of the government vehicle and ran to the driver's side of Romero's car. Saiz stated that Romero was under arrest for violation of the Federal narcotic laws [R. T. 209]. Romero attempted to start his car. The agent reached in the window to get the ignition keys. At this time Romero started the car and drove backwards, knocking the agent from the window.

Knowing that Agent Watson was somewhere at the rear of Romero's car, Agent Saiz then fired into the left front tire of Romero's Cadillac. Romero started fighting with Agent Saiz. During the struggle, Agent Saiz struck Romero with his gun. Romero continued fighting and it was necessary for Agent Watson to assist Agent Saiz in subduing Romero [R. T. 218-221]. After Romero was arrested, he was placed in the back seat of the Cadillac with Agent Watson and Agent Saiz drove the Cadillac approximately four blocks North on Meeker to a service station. During this drive appellant Romero was admonished that he did not have to make any statements; that any statements he made could be used against him in a court of law and that he was entitled to an attorney. Romero answered, "I know all that. I have been through it before." [R. T. 222]. At the service station Romero asked to speak to the agent in charge of the investigation [R. T. 190, 222]. Once again appellant Romero was admonished that he didn't have to say anything, anything he said could be used against him and that he had the right to an attorney. Romero stated he understood [R. T. 193]. The agent did not question appellant Romero. Other than the constitutional admonition all statements were made by appellant Romero. Romero stated he had had a premonition that he was going to be caught; that he was contemplating giving up selling junk; that he should have done it long before; he had stayed up nights thinking about getting caught by authorities and he was glad it was over. He said if we would be fair to him he would be fair to us. That the rest of the heroin was stashed at Tickle's residence

[R. T. 193-194].

2. RECOVERY OF THE HEROIN DESCRIBED IN COUNT TWO.

After Romero's arrest, Agent Lipschutz left the El Monte area to drive to the Federal Building. He radioed his office to call the United States Commissioner and ask if he would agree to come down to the Federal Building [R. T. 132]. While preparing an affidavit for the search warrant, Agent Lipschutz received additional information regarding the telephone number at the booth where the heroin had been recovered, as well as appellant Romero's statement that the rest of the narcotics was at Tickle's residence from Agent Mendelsohn [R. T. 133]. After securing the search warrant, Agent Lipschutz drove to the Cloverly Street address of appellant Tickle where he met with other agents. Agent Lipschutz went to the door and knocked. Appellant Tickle came to the door. Agent Lipschutz stated, "Federal Agents, we have a search warrant for your residence." Appellant Tickle opened the door and invited the agents in. The search warrant was displayed and appellant Tickle, who was not under arrest at this time, was asked one question. "Do you have any money, valuables, narcotics or narcotic paraphernalia,"to which he replied, "I'll show you where Dave keeps it." [R. T. 135]. Thereupon Tickle led the agents to several locations and no narcotics were found. Shortly, other agents arrived with appellant Romero. After they entered the residence Romero told

Tickle "I'm going to cooperate. I'm going to tell them where it is. Everything is going to be O.K." [R.T. 388]. Romero, Tickle and the agents then proceeded into the kitchen and Mr. Romero stated the package is under the sink. The agent then retrieved the package containing the heroin described in Count Two of the indictment [R.T. 388]. After this heroin was recovered, the agents arrested appellant Tickle [R.T. 411].

On May 11th each appellant was arraigned before the Commissioner and appellant Tickle was released on a $2500 bond, personal surety [R.T. 517]. On August 3rd the indictment was returned and a bench warrant was issued. Bond was set in the amount of $15,000 as to appellant Tickle and $35,000 as to appellant Romero [R.T. 517].

That evening appellant Tickle was arrested and arrived at the offices of the Federal Bureau of Narcotics at approximately 7:30 P.M. [R.T. 392]. Tickle was fully advised of his Constitutional rights in compliance with Miranda v. Arizona, 384 U.S. 436 [Ex. 2, R.T. 394]. He stated that he understood and thereafter related his involvement in narcotics traffic [R.T. 395-397]. During the evening of August 3, 1966, there was no mention of bail or bond reduction [R.T. 434].

Tickle's oral confession of August 3, 1966, was placed in writing on August 4, 1966 and signed by Tickle at approximately 1:00 P.M. [R.T. 427, 434]. While the confession was being typed Tickle asked about his bond stating in substance that Romero was the only one who could give Tickle that much money and Tickle did

not want his cooperation known to Romero. The agent said he couldn't promise anything, but he would talk to the U. S. Attorney and see if a bond reduction would be possible [R. T. 529-531].

At approximately 2:30 P. M., August 4, 1966, a court order was obtained reducing appellant Tickle's bond [R. T. 425].

IV

ARGUMENT

A. ROMERO'S ARREST WAS BASED ON PROBABLE CAUSE

"Probable cause exists when the facts and circumstances within [the arresting officers'] knowledge and of which they have had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."

Draper v. United States, 358 U.S. 307 (1959).

David Romero was arrested at the corner of Meeker and San Ignacio on May 10, 1966 at approximately 6:40 P.M.

At the time of his arrest the agents knew:

1) An unidentified informer named Juan Sanchez stated Romero was trafficking in narcotics and "Manuel Areyano" was smuggling narcotics into the United States for Romero.

2) As previously described the identifying information given by the informant was investigated and found to be correct.

3) "Manuel Areyano" was known to the Bureau of Customs as a suspected narcotics smuggler.

4) Vehicles registered to Manuel Arellanes and Juana Arellanes were observed at the residence owned by Romero.

5) Romero had previously been convicted of possession of heroin.

6) Romero had been charged in San Diego with smuggling amphetamine tablets and 4 ounces of heroin located nearby his person. He was acquitted of the heroin offense but convicted of smuggling the drugs.

7) Another informant stated that Romero had delivered narcotics to Charles "Snooky" Toliver while Romero was at liberty on appeal bond from the San Diego conviction.

8) This information was corroborated by information from the Oakland Police Department, San Francisco Office of the Bureau of Narcotics and the telephone company records of calls from the Romero and Tickle residences to the residence of Toliver, as previously described.

Information from a reliable informant constitutes probable cause. An informant is reliable if he has given prior verified information or the instant information is corroborated.

Jones v. United States, 326 F. 2d 124 (9th Cir. 1963).

9) On May 10, 1966, with access to a telephone at the

Tickle residence [R. T. 79] and other telephones in the commercial districts through which he passed after leaving Tickle's house, Romero drove to a phone booth at Garvey and Meeker. Although Romero did not pass the phone booth at Garvey and Meeker, he parked approximately one and a half blocks away, indicating a planned destination. This is reinforced in that Romero performed no normal or usual activity in the phone booth. He received no telephone call, he placed no telephone call, he did not look in the telephone directory. A movement of his hand in the area of the counter beneath the telephone was the only activity. Appellant returned to his car and sat watching the telephone booth.

10) Agent Downing was the next person to enter the phone booth and he found a packet of heroin in the exact area where the movement or Romero's hands were observed -- the counter under the phone.

11) When Agent Downing gave the signal indicating he had found narcotics, Romero who had been observing this activity, started his car and drove from the scene.

12) While driving beside Romero, Agents identified themselves as Narcotics Agents and directed Romero to stop. Although Romero heard this and nodded consent, he accelerated to high speeds, driving

hazardously in a desperate effort to escape. After his car spun out of control and was stopped, an agent identified himself as a Narcotic Agent, and Romero continued physically to resist arrest. "Flight from law officers in evidence of guilt." Monetti v. United States, 299 F. 2d 847, 851 (5th Cir. 1962); see also Rosetti v. United States, 315 F. 2d 86 (9th Cir. 1963); Rivers v. United States, 270 F. 2d 435 (9th Cir. 1959), cert. denied 362 U. S. 920.

In Bell v. United States, 254 F. 2d 82 (D. C. Cir. 1958), police officers saw the defendant and another man pull away from the curb in front of a store and drive two blocks without lights at 3:30 A. M. When stopped, officers observed forty cartons of cigarettes on the back seat of the car. When the officer inquired where they got the cigarettes, defendants answered "at a place in Maryland". One defendant then made a motion to reach under the seat. The officer ordered both men out of the car and placed them under arrest for housebreaking. At the time of the arrest, the officers did not know that the crime of housebreaking and larceny had in fact occurred. The Circuit Court held the officers had reasonable grounds to believe a felony had been committed and that the men in the car had committed it, therefore the arrest was valid. The court specifically noted that the events must be viewed as

sudden and unanticipated circumstances and that certain facts may indicate probable cause to an experienced officer which would be meaningless to another. This holding is applicable to the instant case. The Narcotic Agents were in surveillance. They did not pre-arrange the setting. Moreover they had greater facts and knowledge than the officers in Bell, supra. The agents knew Romero was a narcotics felon. The agents knew that two separate informants had described Romero's narcotics involvement. The agents knew that information supplied by the informants had been corroborated.

On cross-examination, appellant's counsel asked the agent who had recovered the heroin from the phone booth. " . . . Agent Downing, based upon your experience [7 years] as a federal narcotics agent, what did you assume that the defendant Romero might be doing when he walked into the phone booth and then walked out again?" The reply was . . . "Based on previous investigation, sir, I assume he was placing heroin there." [R. T. 182-183].

Based on the totality of information then available added to the recovery of heroin from the phone booth and the flight of appellant Romero, there was probable cause for the arrest of David Romero.

Carlos Garcia v. United States, ___ F. 2d ___
#21,084 (9th Cir. 7/27/67);
Redmon v. United States, 355 F. 2d 407
(9th Cir. 1966);

Newcomb v. United States, 327 F. 2d 649

(9th Cir. 1964), cert. denied 377 U. S. 944.

B. ADMISSIBILITY OF VOLUNTEERED STATEMENTS OF DAVID ROMERO

On two separate occasions appellant Romero volunteered admissions inculpating himself as to both counts One and Two. The first statement occurred approximately four blocks from the scene of his arrest at a gas station. Appellant asked to see the agent in charge, who was an agent other than the arresting officer. The agent in charge responded to appellant Romero's request and advised appellant in substance that anything he said could be used against him and that he had the right to an attorney. The appellant stated he understood his rights. This meeting was initiated at the request of appellant. Without questioning or any other prompting Romero stated: "He had a premonition that he was going to get caught; that he was contemplating giving up selling junk [heroin]; that he should have done it long before but he had stayed up nights thinking about this getting caught by authorities; and he was glad it was over. He said that if we were fair with him, he would be fair with us. That the rest of the heroin was stashed at Tickle's residence." [R. T. 193, 194].

The second statement was at the residence of appellant Tickle. Here again appellant Romero was not interrogated by the Agent. In fact the statement by appellant Romero was primarily

made to appellant Tickle as follows: "I'm going to cooperate. Everything is going to be O. K. I'm going to show them where it is." [R. T. 99]. Then Romero told the agents "the package is up under the sink" [R. T. 386-388].

Appellant's first contention is that these statements are inadmissible because of the lack of an adequate admonition of constitutional rights within the requirement of Miranda v. Arizona, 384 U. S. 436. The warnings were legally adequate at the time given but not legally adequate at the time of trial. Ironically, Romero stated in effect that he knew his rights because he had been through it before [R. T. 222]. Moreover, Romero did not need to have counsel appointed.

> "In dealing with statements obtained during interrogation, we do not purport to find all confessions inadmissible . . . . The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that the police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." [emphasis added]

Miranda v. Arizona, 384 U. S. 436, 478 (1966).

As to the first statement in the instant case, it is clear that Romero called the agent of his choice. It was Romero's desire to volunteer information. Romero's statement was not solicited by the agents. There was no interrogation by the agent. All of these facts are equally applicable to his second statement with the addition that most of the second statement was not even made to an agent but was a statement of assurance made to a co-defendant. Romero's direction to look under the sink merely was cumulative and corroborative of his first statement that the rest of the heroin was in Tickle's house.

Clearly both statements should be admissible for all purposes for the reason that " . . . it is apparent that such statement was unresponsive, spontaneous and voluntarily made by the appellant for his own reasons and was not ellicited by the interrogation of the agents".

Redmon v. United States, 355 F. 2d 407, 409 (9th Cir. 1966);

See also: Davidson v. United States, 371 F. 2d 994 (10th Cir. 1966);

People v. Pike, 48 Cal. Rptr. 575 (1965);

People v. Vallarta, 45 Cal. Rptr. 631 (1965).

The second ground urged for holding statements inadmissible is that they are fruits of the illegal arrest within the holding of Wong Sun v. United States, 371 U. S. 470 (1963). However, as previously presented, the arrest was legal, being based on probable cause.

The third contention of appellant is that the first statement of Romero is inadmissible for the reason that it was involuntary. The basis for this argument is that force was necessary to effect the arrest.

> "The test to determine the voluntary or involuntary character of admissions or a confession is whether the accused, at the time he made them, is in possession of 'mental freedom' to confess or deny a suspected participation in the crime. . . . In order to arrive at such a determination it is necessary to look at and consider all the facts and circumstances surrounding the making of the admission or confessions."
>
> McHenry v. United States, 308 F. 2d 700, 703 (10th Cir. 1962).

In Costello v. United States, 298 F. 2d 99, 100 (9th Cir. 1962), "force was employed to the extent that appellant was struck on the head with the policeman's side arms and became so saturated with blood that the jailers refused to admit him when he was presented for incarceration". This Court held that the use of such force did not render invalid the arrest and concurrent search. When "without provocation other than the very announcement of arrest, appellant charged and began to grapple with the officers in an effort to escape. The officers were justified in using such force as under the circumstances was reasonably necessary to effect the

arrest or prevent the escape of appellant." Costello, supra, at p. 100.

It is clear that a confession or statement is inadmissible if it is the product of physical force, threats of physical force or psychological coercion.

Beecher v. Alabama, 2 C. R. L. 3010 (Oct. 23, 1967).

In Stein v. United States, 346 U. S. 156 (1953), the defendant suffered physical violence during the course of his arrest. However the court held that the confessions were not obtained by this physical violence, placing particular emphasis on the fact that one of the defendants decided for himself with whom he would negotiate and the quid pro quo for which he would confess thus clearly indicating he was in control of himself and his statement was voluntary. In Stroble v. United States, 343 U. S. 181 (1952), there was physical violence associated with the arrest. However the court noted that there was a break in time between the arrest and confession. That there was no demand that the defendant implicate himself and that in fact the defendant was anxious to confess. Thus the confession was not the result of coercion.

These holdings are applicable to the instant case. There was a break in time between the arrest and the first statement of appellant Romero. There was a difference in the place of arrest and the place of the first statement of Romero. The physical force was only that necessary to effectuate the arrest. It was not a coercion to secure statements or admissions. There was no interrogation of appellant Romero. It was his personal decision to speak. The

statement was made at his request. He decided for himself with whom he would talk, which was a person other than the arresting officers and he stated the quid pro quo, that is, be fair with me and I'll be fair with you. For these reasons it is apparent that the district court judge's finding is correct. Appellant's statement was not the result of any force. The appellant was not young, impressionable or easily led. He had "been through it before" and was capable of handling himself, in the circumstances of the instant case.

The last point raised as the basis for alleged inadmissibility of both of Romero's statements is unnecessary delay in arraignment. A chronology of events is important. Appellant Romero's arrest occurred at approximately 6:40 P. M. on May 10, 1966. Shortly thereafter Agent Lipschutz of the Federal Bureau of Narcotics left the vicinity of the arrest in El Monte to drive to the Federal Building to see if he could contact the United States Commissioner and obtain a search warrant. The United States Commissioner did not hold office after 4:00 P. M. [R. T. 41]. Appellant Romero's first statement was made four blocks from the scene of the arrest and obviously while Agent Lipschutz was driving from El Monte to the downtown area. At the time Agent Lipschutz was driving to the Federal Building he did not know if the United States Commissioner would leave his residence to come to the Federal Building for the purposes of issuing the search warrant. The entire circumstances indicate that at best the agents were merely hopeful of securing a warrant. Appellant Romero's first statement was made prior to the issuance of the search warrant and clearly prior to any knowledge

on the part of the agent that the United States Commissioner would be willing to return to the Federal Building. (Part of the statement is contained in the Affidavit.)

Appellant Romero's volunteered statement made shortly after arrest is admissible as a "threshhold statement".

> "The duty enjoined upon arresting officers to arraign 'without unnecessary delay' indicates that the command does not fall from mechanical or automatic obedience. Circumstances may justify a brief delay between arrest and arraignment, as for instance, where the story volunteered by the accused is susceptible to verification through third parties. But the delay must not be of a nature to give opportunity for the extraction of a confession."
>
> Mallory v. United States, 354 U.S. 449, 454-455 (1957).

In the instant case there was no delay for the purposes of interrogating the defendant, indeed, there was no interrogation of the defendant. The defendant solicited the right to see the agent in charge and without questioning volunteered admissions of guilt.

In United States v. Mitchell, 322 U.S. 65 (1934), the defendant was arrested at his home and driven by the police to the precinct station. Within a few minutes of his arrival at the station the defendant admitted guilt. He was subsequently held for 8 days before arraignment. The court held that his admissions at the police

station were properly received in evidence and not effected by the subsequent illegal detention of eight days.

As recently as 1961, Mr. Justice Frankfurter, the author of the Mitchell and Mallory opinions said:

> " . . . Of course, our decision in United States v. Mitchell . . . makes clear that confessions made curing the period immediately following arrest and before delay becomes unlawful are not to be excluded under the rule."
>
> Culumbe v. Conn., 367 U.S. 568, 599 (1961).

The second statement of appellant Romero is also admissible. This statement at Tickle's house was not the result of interrogation by officers, it was a statement made primarily to a co-defendant, volunteered by appellant. That portion of the statement directing the agents to the heroin was volunteered by Romero. It was corroborative and cumulative of the first statement. Romero had already told the agents that heroin was in Tickle's house. The Trial Judge stated the agents would probably have the heroin without Romero's statement [R. T. 369]. The entire purpose of the drive to the Tickle residence was a valid method of intelligent and effective law enforcement. That is, to secure narcotic contraband and verify the story volunteered by appellant Romero.

In Lockley v. United States, 270 F. 2d 915 (D. C. Cir. 1959), the defendant orally confessed 15 minutes after his arrest. Thereafter the officer drove the defendant to various scenes of the crimes.

Lockley was arrested at approximately 4:30 A. M. At approximately 9 A. M. officers began typing a written confession which the defendant signed. He was not arraigned until approximately 1:45 P. M. on the same date. The court held both the confession after arrest and the later written confession were admissible.

> "When we accept a threshhold utterance of an accused who spontaneously and promptly tells the police that he 'shot a man', it places too much stress on common sense to say that we should exclude his more detailed statement concerning the event made shortly thereafter. Some reasonable latitude must be allowed the police officers working under stress with situations and problems which are inherently charged with emotional elements and circumstances not conducive to the calm reflective processes available in ex post facto evaluation at the appellate stage. Perry v. United States, 347 F.2d 813, 815-816 (D.C. Cir. 1964)."

C. THE SEARCH WARRANT WAS VALIDLY ISSUED.

Each appellant contends the search warrant is invalid. As a first ground, they state the inclusion of part of Romero's statements made after arrest should cause the entire warrant to fail. As previously stated this volunteered statement was admissible for all purposes and the argument will not be repeated here.

As a second ground they contend failure to set forth probable cause and proceed in a hypertechnical manner to examine bits and pieces of the affidavit, discovering such alleged errors as:

1) we do not know whose affidavit is attached.

The Affidavit for Search Warrant contained the signature of Irving Lipschutz of the Federal Bureau of Narcotics as the affiant. The appended affidavit, which greatly exceeded in length the space available on the printed form, identifies itself as "Affidavit prepared by Agent Irving Lipschutz of the Federal Bureau of Narcotics on May 10, 1966."

2) Lack of candor in identifying Juan Sanchez as a "Mexican National".

Agreed, this is not an established fact. However, it is a reasonable conclusion that a person named Juan Sanchez, who mails letters from Mexicali, Baja California, written in Spanish although addressed to citizens of the United States,

is a Mexican National.

3) Overstated and Inaccurate to state that "calls to" twenty persons with narcotic convictions were made from the Romero residence.

The numbers called were registered in the names of twenty different persons who were of record with the Federal Bureau of Narcotics and who had narcotic convictions. They were completed telephone calls rather than unanswered calls. One of the numbers was registered to Charles Toliver. Another informant states Romero had delivered narcotics to Toliver which was corroborated by the car rental and the fact that Romero had been seen in the vicinity of the Toliver residence. A reasonable conclusion that they were "calls to" said persons.

4) The statement that Toliver received his narcotic supply "that day from the person in the rented vehicle" is valueless.

The search warrant was issued because there was reason to believe that heroin was located in the Tickle residence. The fact that an informant said Toliver received narcotics on a specified date from "the person in the rented vehicle" has great value, because "the person" was Tickle. This informant and information was credible because an independent investigation corroborated that on that

date Tickle rented a vehicle, in that city, using Romero's credit card. Romero expressly authorized this use of the credit card. Another informant stated Romero is involved in narcotics. Independent investigation showed frequent telephone calls from the Romero residence to the Tickle residence. Surveillance showed Romero proceeded from his residence to the Tickle residence and then to various areas. When Romero deposited the heroin in the phone booth, he had just come from the Tickle residence. Romero said the heroin was in the Tickle residence. Thus information that Tickle was involved in narcotics with Romero on a separate occasion, is relevant.

5) It is not true that Manuel Arellanes is the person mentioned in the letters from Juan Sanchez.

Agreed, Juan Sanchez stated that Manuel "Areyano" of San Luis Rio Colorado, Sonora, Mexico, smuggled narcotics into the United States for Romero. "Areyano" is a phonetic spelling of "Arrellanes" as pronounced in Spanish. It is reasonable to conclude that Manuel Arrellanes of San Luis Rio Colorado, Sonora, Mexico is Manuel "Areyano" of San Luis Rio Colorado, Sonora, Mexico.

6) It is not true that Romero "appeared" to leave

something near the phone.

The affiant was actually conservative in this statement. Romero did not "appear" to leave something; rather he did in fact leave something [heroin] near the phone.

7) Affiant did not see Romero, but another agent did.

The last paragraph clearly indicates the information was derived from the personal observation of agents of the Federal Bureau of Narcotics. Affiant is justified in giving credence to fellow agents. Chin Kay v. United States, 311 F. 2d 317 (9th Cir. 1962).

8) Fails to disclose the time Romero entered the phone booth.

The last paragraph states all observed actions of Romero from 5:20 P. M. on May 10, 1966. Failure to specify the time of each action is without merit. Travis v. United States, 362 F. 2d 477 (9th Cir. 1966), cert. denied 385 U. S. 885.

9) It is not true that Agent Downing "retrieved a tin foil package which contained heroin (field test)."

This is true. Agent Downing did recover the heroin. Agent Downing observed a Marquis Reagent test performed in the field which showed a positive reaction [R. T. 170-171]. The affidavit does not state that Agent Downing performed the field test.

There is no basis in fact for appellants' conclusion that the field test was performed after the search warrant was secured.

10) It is an unfounded conclusion by an absent affiant that "Romero observed this".

The affiant was present in the area of the phone booth. He did not observe Romero but through radio communications learned of Romero's actions [R. T. 93-94]. After exiting the phone booth, Romero sat in his car. Romero started his car at the same time Agent Downing waved his hand to signal the recovery of heroin. It is a reasonable conclusion that "Romero observed this" [R. T. 216].

11) It is not clear what Romero observed.

Perhaps technically the affiant improperly positioned his nouns and pronouns. However a common sense reading of the two sentences shows that Romero observed Agent Downing recover the heroin.

12) "Left hurriedly" is vague.

Clearly the reader knows that after Romero saw an agent recover the heroin Romero had deposited, Romero left the scene in other than a leisurely, carefree manner.

13) It is inaccurate to state that Romero attempted to "flee on foot".

Appellee agrees Romero did not "flee on foot". His flight was by car. In Rugendorf v. United States, 376 U.S. 528 (1964), there were two inaccuracies in the affidavit for search warrant which were held immaterial since affiant was not the source of the information and there was no bad faith. This reasoning is applicable to the instant case. Clearly there was no willful or deliberate misrepresentation by the affiant.

14) Romero's statement that "heroin was in Tickle's home" does not establish that heroin was then and there in Tickle's house.

Romero had just placed heroin in a phone booth. Romero was trafficking in heroin. It is reasonable to conclude that Romero had an accessible supply of heroin. Romero had just come from the Tickle house. In effect, Romero stated his supply was in Tickle's house.

"The standard applied by the magistrate is not that of certainty that the objects sought will be found as a result of the search." Porter v. United States, 335 F. 2d 602, 604 (9th Cir. 1964), cert. denied 379 U.S. 983.

15) Romero is not a credible informant.

The agents had independently determined the association of Romero and Tickle. Romero and

Tickle had previously been involved in narcotics transactions with Charles Toliver. Romero had just come from Tickle's house, when Romero deposited heroin in the phone booth. Moreover, Romero was an admitted participant in the crime he had just committed and the crime he was reporting. There was a substantial basis for crediting the information from Romero. Gilbert v. United States, 366 F. 2d 923 (9th Cir. 1966), cert. denied 87 S. Ct. 1961.

Appellants have asked this Court to apply technical requirements of elaborate specificity in reviewing this search warrant. Yet this Court has already stated in Porter v. United States, 335 F. 2d 602, at 604 (9th Cir. 1964), cert. denied 379 U.S. 983.

> "We have no inclination to study the affidavit of a police officer, applying for a warrant, as if it were a pleading prepared by counsel in a lawsuit. The policeman makes his statement in his own unprofessional language and the magistrate determines whether the substance of it shows probable cause for the search."

In Travis v. United States, 362 F. 2d 477 (9th Cir. 1966), cert. denied 385 U.S. 885, this Court upheld a search warrant which was based primarily on information from an unidentified

source that the defendant had previously transported heroin on trips of similar flight patterns. Neither the affiant or his unidentified source had personal knowledge that defendant was in possession of narcotics at the time in question. The instant affidavit contains a substantially stronger showing of probable cause. In addition to the other information concerning Romero, Tickle and narcotics, the agents had just recovered narcotics which one logically concludes had also been transported from the Tickle residence to the phone booth.

> "Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants."
>
> United States v. Ventresca, 380 U.S. 102, 109 (1965).

Appellee submits the instant affidavit clearly establishes probable cause.

D. TICKLE'S VOLUNTARY CONFESSION WAS LEGALLY OBTAINED

Appellant Tickle contends his confession was improperly received in evidence and as a first ground alleges the confession is the product of the illegal search of his home. As previously presented the search was pursuant to a search warrant properly issued and the argument will not be repeated here.

As a second ground Tickle contends the confession was obtained by denying him his right to counsel. Tickle was represented on May 11, 1966 by Mr. Sherman for the "preliminary only, first presentment" [R. T. 540-541]. The agents were not advised that Mr. Sherman represented Tickle thereafter [R. T. 522, 524]. Prior to interviewing Tickle on August 3, 1966, the agents stated:

> "Well, Mr. Sherman appeared for you at the Commissioner's hearing.
>
> "He stated, 'I haven't seen him since the Commissioner's hearing here. And he's not my attorney now.'
>
> "What do you mean by that.
>
> "He said, 'He cannot help me. Dave pays him all the money. What can he do for me?'
>
> " 'Is he your attorney now?'
>
> "He said, 'No'.
>
> "I said, 'Do you have an attorney?'
>
> "He said, 'No.' " [R. T. 397].

The agents advised Mr. Tickle of his constitutional rights and gave Mr. Tickle a printed form titled "Warning of Rights Prior to Interview" which he was observed to read. Tickle stated he understood. This admonition fulfills the requirements of the Miranda decision, supra [Ex. 2, R. T. 394-395]. Mr. Tickle then related the facts which was later placed in written form and signed by Tickle on August 4, 1966 [R. T. 434]. On August 4, 1966, prior to preparing the written confession, the agents asked if he still wanted to cooperate and repeated the Constitutional Warning [R. T. 398, 404]. Tickle stated he understood Mr. Sherman telephoned on August 4, 1966, at approximately 11:00 A. M., and requested that the agents stop interviewing Tickle. The agents did stop [R. T. 519-520, 508-509, 528]. When Mr. Sherman arrived at the office of the Federal Bureau of Narcotics, he was taken into the front office and Mr. Tickle was brought in. In response to Mr. Sherman's questions, Tickle said that he was not represented by Mr. Sherman [R. T. 444, 511, 521]. On August 15, 1966 a designation of counsel and appearance praecipe was failed with the court showing that Mr. Sherman represented Tickle [R. T. 542]. On October 10, 1966 Mr. Sherman requested a continuation of trial to allow Tickle to secure other counsel. Mr. Sherman stated there was a conflict of interest between Tickle and Romero and that Mr. Sherman had been aware from the inception of the case that he could not and would not represent Tickle. In addition, Mr. Sherman stated he had told Tickle on numerous occasions to consult other counsel [R. T. 22, 27]. Appellant Tickle was represented by other counsel at his trial.

Appellant Tickle was never denied his right to counsel. He was properly advised of his right to counsel and affirmatively waived it. The attorney does not choose the client. The agents properly relied on Tickle's waiver to Mr. Sherman's representation.

Appellant Tickle did not move to suppress his confession [R. T. 246]. At trial the defense questioned the voluntariness of the confession [R. T. 479-481, 559]. Did the second arrest and discussion of bond reduction constitute an inducement which forced the confession. The District Court Judge, as trier of the facts held:

> "Well, I think not. All things taken into consideration, I think not. But irrespective of the confession, I think the evidence is sufficient to convict the defendant.
>
> "He was aware that he was keeping packages at least. There is from his own testimony on the stand that he was keeping packages in his house for Mr. Romero, and Romero would go in and out of that place from time to time and take these packages and apparently kept them there with Mr. Tickle's consent.
>
> "The other circumstances of the case indicate to me that he knew what was in those packages, that is, that they were contraband. I think that he knew what they contained. He was willing to show it. His testimony in court, while not as detailed and as

complete as his confession, indicated, I think, that he was clearly guilty of the offense charged.

"So I find him guilty as charged."

[R. T. 605-606].

Appellant Tickle has failed to establish that his confession was not voluntary.

Redmon v. United States, 355 F. 2d 407 (9th Cir. 1966).

E. SUFFICIENCY OF THE EVIDENCE

The Government respectfully submits that the evidence is sufficient to sustain the verdict. Especially is this true when this Court, as it must, considers the evidence and inferences that can be drawn therefrom most favorably to the Government.

Glasser v. United States, 315 U. S. 60 (1941);

Moody v. United States, 376 F. 2d 525 (9th Cir. 1967.

1) Count One

Proof of possession of narcotics may be shown by circumstantial evidence only.

Green v. United States, 282 F. 2d 388 (9th Cir. 1960).

A present or past possession of heroin is sufficient.

Rodella v. United States, 286 F. 2d 306 (9th Cir. 1960).

All of the facts regarding Romero's trip to the telephone booth, his actions within the telephone booth, the heroin recovered from the telephone booth and his efforts to escape from the narcotics agents support the reasonable inference that at the time of Romero's arrest, he had had possession of the heroin in the telephone booth.

In Agobian and Egishian v. United States, 323 F. 2d 693 (9th Cir. 1963), officers were pursuing the defendants who were attempting to escape by car. An object was thrown from defendant's car and the sound of the glass breaking was heard. Later officers recovered broken glass and heroin in a metal jar lid along the route of defendants' attempted escape. The Court held the defendants had had possession of the heroin recovered in the street.

This evidence standing alone would sustain the conviction. But in addition there is the admissible volunteered statement by Romero shortly after arrest which identifies himself as the person who placed the narcotics in the phone booth.

> "When at the approach of the officers, the jar containing the heroin was thrown out of the window of appellant's residence, it was shown that a moment earlier someone had had possession of narcotics. In the absence of explanation showing the possession to be lawful it was presumed unlawful under 21 U. S. C. A. Section 174. Thus the corpus delecti of the offense charged was fully established prior to and independent of the statements of appellant [which identified appellant

as the prior possessor of the heroin]."

Cutchlow v. United States, 301 F. 2d 295, 297 (9th Cir. 1962).

2) Count Two as to Appellant Romero.

In like manner, the fact that Romero had just left the Tickle residence, he had delivered the heroin described in Count One, the heroin in Count Two was recovered at the Tickle residence owned by Romero, added to his statement shortly after arrest that "the rest of the heroin was stashed at Tickle's residence", is sufficient to sustain the conviction in Count Two [R. T. 193]. There is the additional evidence that later Romero told Tickle "I am going to show them where it is" and then Romero told the agents the heroin was hidden under the kitchen sink [R. T. 99].

Finally, appellant Romero testified in his own behalf primarily as to his arrest. In addition, Romero denied his incriminating statements. He denied telling the agents that the rest of the heroin was at Tickle's residence [R. T. 272, 280]. Romero denied telling the agents at Tickle's residence, that the heroin was under the sink [R. T. 273]. However, Romero failed to deny or explain his trip to the telephone booth, the heroin found in the telephone booth, his flight from the area of the phone booth or the heroin found at the Tickle residence.

This failure to deny or explain incriminating facts already in evidence may be considered adversely to Romero by the trier

of the facts.

Dyson v. United States, 283 F. 2d 636 (9th Cir. 1960); Klepper v. United States, 331 F. 2d 694 (9th Cir. 1964).

3) Count Two as to Appellant Tickle

When Romero deposited the heroin in the phone booth he had just come from the Tickle residence. Tickle and his family were the sole residents at the Cloverly Street address. Romero resided at a different location [R. T. 468]. When agents were admitted into the Tickle residence they asked one question, "if he had any narcotics, weapons, or any narcotic paraphernalia or valuables in the residence. Whereupon Mr. Tickle said, 'I'll show you where Dave keeps it.' " [R. T. 387]. Tickle was not under arrest at this time. At his trial, Tickle admitted this statement but denied that he was referring to narcotics [R. T. 471]. However, it is clear that Tickle meant where "Dave kept the narcotics". At this time, the agents hadn't mentioned David Romero. Thereafter Tickle tried to mislead the agents by showing them locations other than the true hiding place of the heroin, until Romero told Tickle that he was going to cooperate [R. T. 387]. Then Tickle accompanied Romero to the kitchen and Romero told the agents the heroin was under the sink.

At trial Tickle admitted storing packages for Romero [R. T. 471]. Tickle admitted that on August 3, 1966, he told the agents he

had been helping Romero in his narcotic business since July 1965 [R. T. 467]. Tickle admitted telling the agents the information contained in his written confession [R. T. 490]. Tickle did not deny the facts contained in his oral and written confessions.

Tickle also testified that at the time he gave his confessions, he knew he was under indictment and was going to be prosecuted [R. T. 492]. No promises were made concerning prosecution or any possible sentence [R. T. 492-493].

The District Court Judge, as trier of the facts stated, "But irrespective of the confession, I think the evidence is sufficient to convict the defendant." [R. T. 605].

Since reasonable minds could find that the evidence excludes every reasonable hypothesis but that of guilt, appellee submits that the verdict must be sustained.

Miller v. United States, ___ F. 2d ___, No. 21,396 (9th Cir. August 30, 1967).

CONCLUSION

For the reasons stated above, the judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Jo Ann Dunne

JO ANN DUNNE